77-1454

PETITION FOR WRIT OF CERTIORARI

Ralph S. Abernathy, Administrator of the Estate of Eural Frank Abernathy

---

In The

UNITED STATES SUPREME COURT

Ralph S. Abernathy, Administrator of the Estate of Eural Frank Abernathy,
PLAINTIFF-PETITIONER

vs.

Schenley Industries, Inc., Schenley Distillers, Inc., Schenley Affiliated Brands Corp., Mecklenburg Board of Alcoholic Beverage Control,
DEFENDANTS-RESPONDENTS

Counsel for Petitioner:

Ronald C. Williams, 100 Attorneys Bldg.
Charlotte, N. C. 28202 (704) 375-4741

Counsel for Respondents:

Harvey L. Cosper, Jr. and Hunter Jones

INDEX

TABLE OF AUTHORITIES

TEXTS AND TREATICES

STATUTES

INTRODUCTION

Petition for writ of certiorari to review the March 10, 1978 Order of the United States Court of Appeals for the Fourth Circuit. Exhibit G.

JURISDICTION

Jurisdiction of this court is invoked pursuant to 28 USC 1254(1).

QUESTIONS PRESENTED

The questions presented are:

(1) Whether the Circuit Court's actions are in conflict with the spirit of the Federal Rules of Appellate Procedure as pronounced by this Court, and;

(2) Whether the Circuit Court has misled Petitioner to his detriment.

Supreme Court Rule 19(1)(b).

FEDERAL STATUTES INVOLVED

Supreme Court Rule 19(1)

A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so

far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

Federal Rules of Appellate Procedure Rule 2

Suspension of Rules. In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b) suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction. 28 USCA.

Federal Rules of Appellate Procedure Rule 27

(a) Content of Motions; Response; Reply. Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or

relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order [for which see subdivision (b)] within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

(b) Determination of Motions for Procedural Orders. Notwithstanding the provisions of the preceding paragraph as to motions generally, motions for procedural orders, including any motion under Rule 26(b) may be acted upon at any time, without awaiting a response thereto. Any party adversely affected by such action may request reconsideration, vacation or modification of such action.

(c) Power of a Single Judge to Entertain Motions. In addition to the authority expressly conferred by these rules or by law, a single judge of a court of appeals may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion, except that a single judge may not dismiss or otherwise determine an appeal or other proceeding, and except that a court of appeals may provide by order or rule that any motion or class of motions must be acted upon by the court. The action of a single judge may be reviewed by the court.

(d) Form of Papers; Number of Copies.

All papers relating to motions may be typewritten. Three copies shall be filed with the original, but the court may require that additional copies be furnished. 28 USCA.

28 USC 1254(1)

Cases in the courts of appeals my be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. June 25, 1948, C. 646, 62 Stat. 928.

28 USC 1331(a)

The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds that sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, Pub.L. 85-554, § 1, 72 Stat. 415.

28 USC 1653

Defective allegations of jurisdiction may be amended, upon terms, in the trial or Appellate Courts. June 25, 1948, c.646, 62 Stat. 944.

STATE STATUTES INVOLVED

North Carolina General Statute 25-2-314.

(1) Unless excluded or modified(§25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

(2) Goods to be merchantable must be at least such as

(a) pass without objection in the trade under the contract description; and

(b) in the case of fungible goods, are of fair average quality within the description; and

(c) are fit for the "ordinary purposes"

for which such goods are used; and

(d) run, within the variations permitted by the agreement, of even kind, qualtiy and quantity within each unit and among all units involved; and

(e) are adequately contained, packaged, and labeled as the agreement may require; and

(f) conform to the promises or affirmations of fact made on the container or label if any.

(3) Unless excluded or modified (§25-2-316) other implied warranties may arise from course of dealing or usage of trade. (1965, c. 700, s. 1.)

North Carolina General Statute 25-2-316.

(1) Words or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but subject to the provisions of this article on parol or extrinsic evidence (§25-2-202) negation or limitation is inoperative to the extent that such construction is unreasonable.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, and to

exclude or modify any implied warranty of fitness the exclusion must be by a writing and conspicuous. Language to exclude all implied warranties of fitness is sufficient if it states, for example, that "There are no warranties which extend beyond the description on the face hereof."

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; and

(b) when the buyer before entering into the contract has examined the goods or the sample or model as fully as he desired or has refused to examine the goods there is no implied warranty with regard to defects which an examination ought in the circumstances to have revealed to him; and

(c) an implied warranty can also be excluded or modified by course of dealing or course of performance or usage of trade.

(4) Remedies for breach of warranty can be limited in accordance with the provisions of this article on liquidation or limitation of damages and on contractual modification of remedy (§§25-2-718 and 25-2-719). (1965, c. 700, s. 1.)

STATEMENT OF THE CASE

The District Court jurisdiction was invoked pursuant to 12 U.S.C. 1331(a), Federal Question.

This action was filed by a North Carolina citizen December 23, 1975 naming the affiliated Schenley Companies (all foreign corporations) the Mecklenburg Board of Alcoholic Beverage Control (a North Carolina citizen) as defendants alleging federal and state claims deriving from a common nucleus of operative fact. Two days later the North Carolina statute of limitations expired. Petitioner alleged that the Schenley Companies distill, advertise at retail, and sell at wholesale, alcoholic beverages; that the Mecklenburg Board of Alcoholic Beverage Control sells alcoholic beverages at retail; that when too much alcoholic beverage is consumed in a short period it anesthetizes the nervous system with the result that the heart and lungs stop functioning immediate-

ly causing "acute ethanol poisoning death"; that about 200 such deaths are certified each year by North Carolina Chief Medical Examiner Dr. Page Hudson; that based on a professional poll of Mecklenburg County, North Carolina, (500,000 population), 70% of all consumers are unaware that when too much alcoholic beverage is consumed in a short period immediate death results(it kills teens and adults alike - Exhibit A); that before December 29, 1973 Respondents had actual knowledge that alcoholic beverage was causing deaths in such fashion but nevertheless sold the whiskey with the full warranty implied by North Carolina General Statute 25-2-314 that it was reasonably safe for all foreseeable uses (ordinary purposes) rather than modifying or excluding the warranty as they had the undisputed right to do under North Carolina General Statute 25-2-316; that such action

constituted a breach of warranty; that under such circumstances Respondents had a common law duty to warn the unwary consumers that when too much whiskey is consumed in a short period immediate death results and failed to so warn them; and that without such warning the whiskey was in an unreasonably unsafe condition when it left the hands of Respondents so as to impose liability under the doctrine of strict liability; that on December 29, 1973 Petitioner's intestate purchased a fifth of Ancient Age Whiskey distilled, advertised and sold by Respondents, drank one-third to one-half and died immediately thereafter; that the autopsy showed death was by "acute ethanol poisoning".

The District Court Judge in his Order filed August 5, 1976 said,

> "Because I have concluded that the Complaint states a federal claim, there is subject matter jurisdiction, and there is pendent jurisdiction over the state claims ***." Exhibit B.

On September 27, 1976, however, the District Judge reversed the prior Order and dismissed the federal claim on its merits and dismissed the state claims without reference to their merits.

Petitioner appealed. On July 7, 1977, the United States Court of Appeals for the Fourth Circuit affirmed dismissal of the federal claims on the merits and the discretionary dismissal of the state claims

> "*** as a matter of comity to promote justice between the parties, by procuring for them a surer-footed reading of applicable law" in state court. See United Mine Workers v. Gibbs, 383 US 715, 726(1966) incorporated by reference in the court's per curium opinion. Exhibit C.

Counsel drafted a Petition for writ of certiorari to this court. That draft is in his file now. He further consulted with a member of the United States Supreme Court Bar, George Daley, who agreed to serve as co-counsel. Counsel had not yet become eligible for the United States Supreme Court Bar. Upon reading the Circuit Court's per curium opinion and United Mine Workers v. Gibbs, counsel realized he was in a queasy position. If he petitioned for rehearing or for certiorari he likely would be faced with the response that he had not yet followed the mandate of the Circuit Court to try to get a state court decision on the merits of the state claims. If he filed the state claims in state court he might be successful in getting a fuling on the merits, but if he were unsuccessful he could then apply to the Circuit Court for relief after having followed its mandate.

His considered judgment, right or wrong, was that if he petitioned for rehearing or for certiorari before attempting to get the state court to hear the state claims on their merits, the Court's response would likely be "the petition is premature - try to get the state court to hear the state claims on their merits."

The state claims were shortly filed in state court on September 23, 1977. Exhibit D. Petitioner argued that the federal court's discretionary dismissal was for the stated purpose of obtaining a trial on the merits in state court, that the original federal action was filed within the period of limitations, that opposing parties had therefore received notice of the claims through that action so as to preserve their evidence, etc., and that the statute of limitations should be tolled during the pendency of the

federal action.

The state court dismissed the state claims as barred by the statute of limitations on February 21, 1978. Exhibit E.

On February 24, 1978, pursuant to Federal Rules of Appellate Procedure, Rule 27, petitioner filed his Motion (Exhibit F) in the United States Court of Appeals for the Fourth Circuit alleging his actions in following the mandate of that court that the state claims be pursued in state court, the result of that action, and asking for an Order directing the district judge to hear the state claims on their merits or to allow petitioner to dismiss Mecklenburg Board of Alcoholic Beverage Control so as to perfect diversity jurisdiction. 28 USC 1653.

Petitioner argued that because the federal claims were substantial (district judge's August 5, 1976 Order, supra) and

they and the state claims derived from a common nucleus of operative fact (undisputed) the court had the power to adjudicate the state claims, United Mine Workers v. Gibbs, 383 US 715, 725(1966); that the dismissal of the state claims with the very clear language that the purpose of the dismissal was,

> "*** to promote justice between the parties, by procuring for them a surer-footed reading of applicable law" in state court

led, or misled, petitioner to file the state claims in the state court rather than to petition for rehearing or for certiorari; that to deny petitioner a decision on the merits constitutes an abuse of discretion because the state court will not hear the case on its merits and because petitioner has been diligent in the prosecution of the case.

United Mine Workers v. Gibbs, supra.

The Circuit Court denied the Motion.

Exhibit G.

ARGUMENT

Federal Rules of Appellate Procedure, Rule 2, is for just such cases as this where appellant has, in good faith and timely fashion, followed the Circuit Court's mandate in an attempt to realize the court's express purpose and been unable to do so. Federal Rules of Appellate Procedure, Rule 2, provides that "for *** good cause shown, a court of appeals *** may suspend the requirements or provisions of these rules in a particular case on application of a party ***."

In the language of the Advisory Committee's Note accompanying Rule 2,

it is "a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result."

> Committee Note. The primary purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules. The rule also contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result. Rule 26(b) prohibits a court of appeals from extending the time for taking appeal or seeking review.

"It would seem the 'good cause' requirement is met whenever there is a substantial question as to the correctness of the judgment or order rendered below and the noncomplaince has not substantially prejudiced an opponent or

seriously interferred with the efficient dispatch of the business of the court. ***

"The first decision to comment on Rule 2 has noted that the Rule mandates an equitable rather than a technical resolution of contentions that the Rules have been violated. Soley v. Star & Herald Co. (CA5th, 1968) 390 F 2d 360, 11FR Serv 2d 12b.336, Case 2. As has already been noted, the Rules must be liberally construed. See ¶201.08(1), supra. Equitable and liberal construction of rules will be insured if the nature of procedural rules is constantly borne in mind. Realistically, rules are simply directives to lawyers on how to proceed in order best to assist the court in the economical and just determination of claims. To decline to hear a claim because rules designed to insure its just

determination have been violated must always be the last, desperate refuge of the courts to be reserved for cases in which violation is destructive of the rights of others or of the ability of the courts to function." 9 Moore's Federal Practice ¶202.02(2).

"The language of Rule 1 of the Federal Rules of Civil Procedure that those rules 'shall be construed to secure the just, speedy and inexpensive determination of every action' does not appear in the Appellate Rules, but only because that canon of procedural rule interpretation has become so accepted as to be commonplace. But the decisions under Rule 1 of the Federal Rules of Civil Procedure that illustrate the liberal construction to be afforded the Civil Rules are clearly applicable to the interpretation of

the Appellate Rules." 9 Moores Federal Practice ¶201.08(1).

"It is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities. 'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.' Conley v. Gibson, 355 US 41, 48, 78 S.Ct.99, 103, 2 L Ed 2d 80." Foman v. Davis, 371 US 178,181,83 S.Ct. 227, 230(1962).

Petitioner's efforts in pursuing the action in state court rather than to petition for re-hearing or certiorari was in good faith reliance on the Circuit

Court's express language incorporated by reference into its opinion, that the discretionary dismissal was for the express purpose "to promote justice between the parties by procuring for them a surer-footed reading of applicable law" in state court. The Circuit Court's action in mandating that Petitioner pursue his state claims in state court and then, after Petitioner followed that mandate denying a decision on the merits, renders its language that the discretionary dismissal was "to promote justice between the parties" a mockery and its mandate a deceptive trap into which Petitioner in good faith was led. Petitioner has not been guilty of default, undue delay or ineptness. On the contrary, he has moved in timely manner. Respondents have not in any way been prejudiced by

Petitioner's attempt to get a state court ruling on the merits. Surely justice would be promoted by a state court ruling on the merits. It is now clear however there will be no such ruling. Surely a ruling on the merits in federal court will "promote justice between the parties" more than avoidance of a decision on the merits. If the federal court feels unsure of its reading of state law the question can be certified to the North Carolina Supreme Court for a "surer-footed reading of applicable law."

Pendent state claims should not be dismissed unless the Plaintiff has access to state courts to adjudicate them. Dismissal where there can be no decision on the merits does not "promote justice between the parties". Dismissal under

such circumstances without any justifying reason "is not an exercise of discretion; it is merely abuse of discretion and inconsistent with the spirit of the Federal Rules". Foman v. Davis, supra, page 182. "If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." Foman v. Davis, Supra, page 182.

WHEREFORE, Petitioner respectfully prays the Court issue a writ of certiorari and order a decision on the merits.

This the 30 day of March, 1978.

Ronald Williams

Ronald Williams
Attorney for Petitioner
Suite 100 Attorneys Bldg.
Charlotte, N. C. 28202
(704) 375-4741

CERTIFICATE OF SERVICE

I hereby certify that I have this day personally served one copy of the Petition for Writ of Certiorari for Plaintiff-Petitioner, Ralph S. Abernathy upon Harvey L. Cosper, Jr., of Golding, Crews, Meekins, Gordon and Gray, 806 E. Trade St., Charlotte, N. C. 28202, attorney for Mecklenburg Borad of Alcoholic Beverage Control; and Messrs. Hunter M. Jones and Larry C. Hewson, 1000 Law Building, Charlotte, North Carolina 28202, attorneys for Schenley Industries,

This the 30 day of March, 1978.

Ronald Williams
100 Attys. Bldg.
Charlotte, NC 28202

EXHIBIT A

AFFIDAVIT

Undersigned, being duly sworn says:

He has interviewed James Conrad O'Connell, father of Stephen O'Connell, and Phillip Grimes, investigator for the Fairfax, Virginia, Police Department. Until a few weeks ago, Stephen lived with his parents in Fairfax, Virginia. During initiation rites into the "neighborhood club" Stephen, 15 years old, drank nearly a quart of vodka and died shortly thereafter. The autopsy showed his death was caused by acute ethanol poisoning. The father of Stephen O'Donnel stated to the undersigned that he was unaware that too much whiskey at once results in immediate death and was of the opinion Stephen

also was unaware of such danger before his death even though he was old enough to read a label warning and follow it if one had been on the bottle.

He has interviewed Dr. Irwin Felson who performed the autopsy on the body of the late Charles Stenzel who at the time of his death was a freshman at Alfred University in Alfred, New York. Dr. Felson advised undersigned that the autopsy showed the cause of death was acute ethanol poisoning. He also interviewed Phillip Fezza who was with Charles Stenzel on the night of his death. Phillip Fezza stated that on the evening of Charles Stenzel's death, February 25, 1978, the two of them and another freshman, William Bush, had pledged a college fraternity together and had gone out to celebrate. The three of them drank too

much alcoholic beverage and were hospitalized. Charles Stenzel died shortly thereafter. Both Phillip Fezza and William Bush were in "critical condition" but survived. Phillip Fezza stated that before the death he was unaware that when too much whiskey is consumed, immediate death results, although he and the others were capable of reading and heeding a warning to such effect if one had been posted.

This the 24th day of March, 1978.

Ronald Williams

Ronald Williams, Affiant

Subscribed and sworn to before me this 24th day of March, 1978.

Vickie H. Perry

Notary Public

My commission expires December 20, 1982.

EXHIBIT B

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, CHARLOTTE DIVISION

C-C-75-387

RALPH S. ABERNATHY,
Administrator of the Estate
of Eural Frank Abernathy,

Plaintiff,

vs. ORDER

SCHENLEY INDUSTIRES, INC.;
SCHENLEY DISTILLERS, INC.;
SCHENLEY AFFILIATED BRANDS CORP.;
MECKLENBURG BOARD OF ALCOHOLIC
BEVERAGE CONTROL; NORTH CAROLINA
BOARD OF ALCOHOLIC BEVERAGE CONTROL
and the STATE OF NORTH CAROLINA,

Defendants.

Plaintiff's decedent allegedly drank too much of defendants' good whiskey, too fast, and died of acute ethanol poisoning. Plaintiff's complaint, as it now stands, alleges violation of 15 U.S.C. § 2068 (Consumer Product Safety Act), 21 U.S.C. § 331 (Adulterated or

Misbranded Food and Drugs), and 27 U.S.C. § 205(e) (Alcohol Labeling), as well as a products liability action under North Carolina law.

Plaintiff says that defendants breached these statutes, and sold a defective product, because they failed to place a label on the whiskey bottle plaintiff's decedent purchased, that warned him of the risk of acute ethanol poisoning.

All defendants have moved for dismissal. The grounds urged are failure to state a claim, a lack of personal and subject matter jurisdiction, the Eleventh Amendment, and sovereign immunity. Plaintiff has made more motions to amend, and a motion to reconsider the previous dismissal of the State of North Carolina.

The court held hearings on all then pending motions, ruled on several discovery

motions, and took the dismissal motions under advisement.

The court has concluded that suit against defendant North Carolina Board of Alcohol Control is barred by the Eleventh Amendment because this, in effect, is a suit against the state. Edelman v. Jordan, 415 U.S. 651 (1974); North Carolina General Statutes § 18A-14.

Defendant Mecklenburg Board of Alcoholic Beverage Control is not entitled to the same immunity, however. Counties, and other political subdivisions, derive no protection from the Eleventh Amendment. Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911).

Moreover, the Board is not immune from the state cause of action. North Carolina General Statutes § 153A-435.

The complaint does state a claim

under North Carolina law, and it apparently does state a claim under 15 U.S.C. § 2068, and 27 U.S.C. §205(e), because of 27 C.F.R. § 5.42(a)(1). It does not state a claim under 21 U.S.C. § 331, because the whiskey was neither misbranded, within the meaning of § 343, nor adulterated, within the meaning of § 351.

I have made the decision about 15 U.S.C. § 2068, and 27 U.S.C. § 205(e), in the absence of legislative history, but under the guidelines announced in Cort v. Ash, 422 U.S. 66 (1975). If any defendant is able to supply any legislative history that tends to show Congress did not intend to allow a private right of action under the statutes, I will reconsider the motions. The defeated bills which would have required warnings are no help, however, because they supply no insight into whether Congress intended to

allow private actions, and they were aimed at chronic poisoning, not acute poisoning.

Because I have concluded that the complaint states a federal claim, there is subject matter jurisdiction, and there is pendent jurisdiction over the state claims, as to the Board, and diversity jurisdiction as to the Schenley defendants.

Plaintiff has filed motions to amend on May 3, 1976 (two motions), May 28, 1976, June 4, 1976, June 11, 1976, and June 28, 1976. No defendant has objected to these motions, except the motions of May 28, June 11 and June 28, 1976, which seek to bring in additional defendants, on a new theory of liability. I want to have a hearing on the question of new parties and theories, before deciding that question.

IT IS THEREFORE ORDERED:

1. That defendant North Carolina Board of Alcohol Control's motion to dismiss is allowed.

2. That defendant Mecklenburg Board of Alcohol Beverage Control's motion to dismiss is denied.

3. That the motions of the Schenley defendants to dismiss are denied.

4. That plaintiff's motions to amend of May 3, and June 4, 1976, are allowed.

5. That plaintiff's motion to reconsider the dismissal of the State of North Carolina, is denied.

This 31st day of July, 1976.

/s/
JAMES B. MC MILLAN
UNITED STATES DISTRICT JUDGE

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 76-2424

Ralph S. Abernathy, Administrator for the Estate of Eural Frank Abernathy,

Appellant,

vs.

Schenley Industries, Inc., Schenley Distillers, Inc., Schenley Affiliated Brands Corporation, Mecklenburg Board of Alcoholic Beverage Control,

Appellees.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

C

Argued May 3, 1977 Decided June 7, 1977

Before WINTER, BUTZNER AND HALL, Circuit Judges.

Ronald Williams for appellant; Hunter M. Jones (Harry C. Hewson, Jones, Hewson & Woolard on brief) for Schenley Industries, Inc., etc.; John G. Goldin (Harvey L. Cosper, Jr., Golding, Crews, Meekins, Gordon & Gray on brief) for Mecklenburg Board of Alcoholic Beverage Control.

PER CURIAM:

Ralph S. Abernathy, administrator of the estate of Eural Frank Abernathy, who died from acute ethanol poisoning, appeals from a judgment of the district court dismissing his action. He alleges that Schenley, as manufacturer, and Mecklenburg Board of Alcoholic Beverage Control, as seller, violated federal statutes by failing to have their labels warn of the

hazard of such poisoning.

The district court concluded that there was no cause of action under the Food, Drug, and Cosmetic Act, because the whiskey was neither misbranded nor adulterated within the meaning of the statute. 21 U.S.C. §§ 331, 343, and 351. It furthere held that the Consumer Products Safety Act does not apply to food, and that beverage alcohol is a food under the statute. 15 U.S.C. § 2052. Finally, the court concluded that because Schenley had followed the relevant regulations in having its label officially approved, it had met its obligation under the statute pertaining to the labelling of intoxicating liquor, 27 U.S.C. § 205(e); 27 C.F.R. §§ 5.1 - 5.56. We affirm.

We also conclude that the district judge did not abuse his discretion in deny-

ing pendent jurisdiction to Abernathy's state law claims. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).

AFFIRMED.

EXHIBIT D

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISON
FILE NO._____

RALPH S. ABERNATHY, Administrator for the Estate of Eural Frank Abernathy,

Plaintiff,

vs. COMPLAINT

SCHENLEY INDUSTRIES, INC., and Subsidiaries, SCHENLEY DISTILLERS, INC., and SCHENLEY AFFILIATED BRANDS CORP., Filed 09-23-77

Defendant.

1. This is a wrongful death action under N.C.G.S. 28A-18-2 et.seq.

PARTIES:

2. Ralph S. Abernathy is a citizen

and resident of Mecklenburg County, North Carolina, and is the duly qualified and acting administrator of the estate of Eural Frank Abernathy, who at the time of his death was a citizen and resident of Mecklenburg County, North Carolina.

3. Schenley Industries, Inc., and Schenley Distillers, Inc., are Delaware corporations. Schenley Affiliated Brands Corporation is a New York corporation. All defendants have their principal offices in New York City. Schenley Industries and Schenley Distillers are not authorized to do business in North Carolina. Schenley Brands' registered agent for service of process is James Newsome, 111 Corcoran Street, Durham, North Carolina. Schenley Distillers and Schenley Brands are wholly owned subsidiaries of Schenley Industries.

HISTORY

4. This action was first instituted December 23, 1975 within two years of the death of Eural Frank Abernathy in the United States District Court for the Western District of North Carolina. Plaintifff's claims in that action were based upon violation of Federal Statutes and upon the state causes of action alleged herein. Plaintiff's claims under the Federal statutes were dismissed upon the Court's holding that the Federal statutes involved do not require a warning on the label. Plaintiff's claims under state law were dismissed because the Court lacked diversity jurisdiction upon the Court's holding that Federal statutes do not require the warning on the label. (Mecklenburg ABC Board was a named Defendant). The District Court's holding was affirmed on appeal

June 7, 1977. This action was instituted within one year from both the dismissal by the District Court and the affirmance of the dismissal by the Circuit Court.

CAUSE OF ACTION

5. On December 29, 1973, and before, defendants regulraly maintained full-time employees in North Carolina to solicit business, regularly advertised in North Carolina, and regularly shipped substantial amounts of alcoholic beverages into North Carolina where they were warehoused and sold. The alcoholic beverages contained no modification or exclusion of implied warranties, or warnings or instructions.

6. On December 29, 1973, and before, all defendants were aware that when too much alcoholic beverage is consumed at once, acute ethanol poisoning occurs and sudden death follows and that people were at that time

being killed by acute ethanol poisoning caused by such consumption and that acute ethanol poisoning may kill a first time drinker, a light, moderage, or heavy drinker.

7. On December 29, 1973, and before, 71% of the population of Mecklenburg County was not aware that when too much alcoholic beverage is consumed at once, sudden death results. Of the 29% that was aware of such fact, 21% lacked enough information to estimate how much at once causes sudden death. The remaining 8% which could venture an estimate wholly lacked any objective criteria by which to judge where the danger of sudden death begins in relation to such consumption. Therefore, because of lack of sufficient information, the whole population, including Erual Frank Abernathy, was and remains, unprotected from the risk of acute

ethanol poisoning. As a result, approximately 200 people in North Carolina and 6,000-8,000 in the nation are killed by acute ethanol poisoning each year as was Eural Frank Abernathy.

8. Eural Frank Abernathy was not aware of (a) the risk of sudden death following consumption of too much alcoholic beverage at once or in a short period of time; (b) how much alcoholic beverage consumed at once or in a short period of time causes sudden death or raises a substantial risk of sudden death.

9. Prior to December 29, 1973, Eural Frank Abernathy was a man of sound mind and body. He was married to his wife of some thirty or so years, owned his home, was regularly employed by Airco, Inc., where he had worked continuously for more than twenty-five years. He had a ten year old daughter.

10. At approximately 7:00 p.m., on

December 29, 1973, Eural Frank Abernathy had no alcohol in his system. At about 7:30 p.m. that evening, he drank a couple of swallows of beer from a glass at his sister's residence in the presence of his sister and sister-in-law. Shortly thereafter, he went to a Mecklenburg ABC Store on Freedom Drive and purchased a fifth of Ancient Age whiskey. His sister and sister-in-law drive him back to his home promptly after the purchase.

11. During the evening, Eural Frank Abernathy remained at home with his daughter and drank one-third to one-half of the fifth of Ancient Age whiskey he had purchased. During the night, he died of acute ethanol poisoning.

12. His death was caused by the Ancient Age whiskey he consumed the evening of his death. The whiskey was

distilled, bottled, and advertised and sold by Defendants.

NEGLIGENT FAILURE TO WARN

13. Paragraphs 1 through 12 are realleged.

14. At the time and place in question, defendants owed to Eural Frank Abernathy the duty to warn of the hazards or dangers of acute ethanol poisoning known to them or which should have been known to them as producers, advertisers and sellers. Notwithstanding that duty, defendants committed one or more of the following negligent acts or omissions which proximately contributed to Eural Frank Abernathy's death.

a. Defendants failed to warn him that if he drank too much whiskey at once, he would be poisoned and die suddenly thereafter.

b. Defendants failed to warn him that if he drank too much whiskey in a short period of time, he would be poisoned and die suddenly thereafter.

c. Defendants failed to provide a general guideline chart to inform him when, in the course of consumption of whiskey, he might be approaching the danger point.

d. Defendants failed to provide even general information to him as to the warning symptoms of acute ethanol poisoning.

15. Wherefore, Plaintiff prays for judgment against Defendants for $500,000.00 compensatory damages.

WILLFUL AND WANTON INJURY AND GROSS NEGLIGENCE

16. Paragraphs 1 through 15 are realleged.

17. At all times material hereto and at the time of the sale, and before, Defendants

had actual knowledge or should have had such knowledge that consumers of various nature and abilities were being poisoned and killed suddenly shortly after consumption of too much alcoholic beverage at once or in a short period of time. Notwithstanding that knowledge, Defendants committed one or more of the following grossly negligent and willful and wanton acts or omissions:

(a) Defendants failed to warn Eural Frank Abernathy that if he drank too much alcoholic beverage at once, he would be poisoned and die suddenly thereafter.

(b) Defendants failed to warn him that if he drank too much alcoholic beverage in a short period of time, he would be poisoned and die suddenly thereafter.

(c) Defendants failed to provide a

general guideline chart to inform him when, in the course of consumption of alcoholic beverage, he might be approaching the danger point.

(d) Defendants failed to provide even general information to him as to the warning symptoms of acute ethanol poisoning.

18. The foregoing wrongful acts or omissions proximately contributed to Eural Frank Abernathy's poisoning and subsequent death.

19. Wherefore, Plaintiff prays for judgment against Defendants for $500,000.00 compensatory damages and $5,000,000.00 punitive damages.

STRICT LIABILITY

20. Paragraphs 1 through 15 are realleged.

21. When the alcoholic beverage left

the hands of defendants, it was in an unreasonably dangerous condition because it was not accompanied by such warnings as were necessary to bring home to the consumer the risk of acute ethanol poisoning death caused by alcoholic beverage consumption.

22. At the time of the sale in Mecklenburg County, 71% of the population of the county was not aware that when too much alcoholic beverage is consumed at once sudden death results. Of the 29% that was aware of the risk of such acute ethanol poisoning death, 21% lacked enough information to even guess how much alcoholic beverage at once causes sudden death. The remaining 8% which could venture a guess, wholly lacked any objective information by which to judge where the danger of

sudden death begins in relation to alcoholic beverage consumption. Therefore, because of lack of sufficient information, the whole population including Eural Frank Abernathy, was and remains unprotected from the risk or hazard of acute ethanol poisoning. As a result, approximately 200 alcoholic beverage consumers are killed in North Carolina each year by acute ethanol poisoning.

23. The defect proximately contributed to Eural Frank Abernathy's poisoning and subsequent death.

24. Wherefore, plaintiff prays for judgment against defendants for $500,000.00 dollars compensatory damages.

WILLFUL AND WANTON INJURY

25. Paragraphs 1 through 15 are realleged.

26. When the alcoholic beverage left

the hands of defendants, they knew or should have known it was in an unreasonably dangerous condition because they had actual knowledge that consumers of various nature and abilities were being subjected to poisoning and sudden death shortly after consumption of too much alcoholic beverage at once or in a short period of time. Notwithstanding that knowledge, defendants committed one or more of the following willful and wanton acts or omissions:

(a) Defendants failed to warn Eural Frank Abernathy that if he drank too much alcoholic beverage at once, he would be poisoned and die suddenly thereafter.

(b) Defendants failed to warn him that if he drank too much alcoholic beverage in a short period of time, he would be poisoned and die suddenly thereafter.

(c) Defendants failed to provide a general guideline chart to inform him when,

in the course of consumption of the alcoholic beverage, he might be approaching the danger point.

27. The foregoing wrongful acts or omissions proximately contributed to Eural Frank Abernathy's poisoning and subsequent death.

28. Wherefore, plaintiff prays for judgment against defendants for $500,000.00 compensatory damages and $5,000,000.00 punitive damages.

BREACH OF EXPRESS WARRANTY

29. Paragraphs 1 through 15 are realleged.

30. On the label of the alcoholic beverage distilled, advertised, and sold by Defendants under the tradename "Ancient Age", defendants stated it possessed a quality of "mellowness". Such statement amounted to an express warranty that the

beverage contained no substance that would kill suddenly after consumption.

31. Defendants' warranty was breached because the beverage was not reasonably fit for the foreseeable use to which Eural Frank Abernathy put it. The breach of warranty proximately contributed to Eural Frank Abernathy's death. Plaintiff prays for judgment Defendants for $500,000.00 compensatory damages.

WILLFUL AND WANTON INJURY

32. Paragraphs 1 through 31 are realleged.

33. When Defendants represented on the label that the beverage was mellow, they had actual knowledge that it was then causing sudden death immediately after consumption of too much at once or in a short period of time. The selling of the whiskey with such warranty on the label

when defendants possessed such knowledge constitutes a reckless, wanton, and intentional indifference to the injurious consequences resulting therefrom.

34. The foregoing acts proximately contributed to Eural Frank Abernathy's poisoning and subsequent death.

35. Wherefore, Plaintiff prays for judgment against defendants for $500,000.00 compensatory damages and $5,000,000.00 punitive damages.

BREACH OF IMPLIED WARRANTY OR MERCHANTABILITY

36. Paragraphs 1 through 15 are realleged.

37. Defendants chose to sell their product under the full warranty of merchantability implied under G.S. 25-2-314, rather than to modify or exclude it as they had the unfettered right to do under G.S. 25-2-316.

38. Defendants could have modified their implied warranty by providing adequate information to the consumer that:

a. When too much alcohol beverage is consumed at once, acute ethanol poisoning death follows.

b. When too much alcohol beverage is consumed in a short period of time, acute ethanol poisoning death follows.

39. Defendants could have completely excluded the implied warranty by simply stating on the label, "There are no warranties which extend beyond the description on the face hereof" or "as is" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and make plain that there is no implied warranty.

40. Defendants' warranty was breached because the beverage was not reasonably fit for the foreseeable use to which Eural Frank Abernathy put it. The breach of warranty proximately contributed to Eural Frank Abernathy's death.

41. Wherefore, Plaintiff prays for judgment against Defendants for $500,000.00 compensatory damages.

WILLFUL AND WANTON INJURY

42. Paragraphs 1 through 15 are re-alleged.

43. When Defendants chose to sell their product with full implied warranty of merchantability, they warranted it to be reasonably fit for all foreseeable uses. At tht time, they had actual knowledge that consumers of various nature and abilities were using alcohol beverage in such a way that they were being subjected to poisoning

and sudden death shortly after consumption. Notwithstanding that knowledge, Defendants committed one or more of the following willful and wanton acts or omissions:

a. Defendants advertised and sold the beverage and failed to modify their full implied warranty by providing adequate information to the consumer that:

(1) When too much alcoholic beverage is consumed at once, acute ethanol poisoning death follows.

(2) Defendants failed to exclude the full implied warranty.

44. The foregoing wrongful acts or omissions proximately contributed to Eural Frank Abernathy's poisoning and subsequent death.

45. Wherefore, Plaintiff prays for judgment against Defendants for $500,000.00 compensatory damages and $5,000,000.00

punitive damages.

BREACH OF IMPLIED WARRANTY OF FITNESS

46. Paragraphs 1 through 15 are realleged.

47. Defendants chose to sell their product under the full warranty of fitness for a particular purpose implied under G.S. 25-2-315 rather than modify or exclude it as they had the unfettered right to do under G.S. 25-2-316.

48. Defendants could have modified their implied warranty by providing adequate information to the consumer that:

a. When too much alcoholic beverage is consumed in a short period of time, acute ethanol poisoning death follows.

b. When too much alcoholic beverage is consumed in a short period of time, acute ethanol poisoning death follows.

49. Defendants could have completely

excluded the implied warranty by simply stating on the label, "There are no warranties which extend beyond the description on the face hereof" or "as is" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty.

50. At the time of the sale, Defendants had reason to know the purpose for which the whiskey was purchased and that consumers of goods, including alcoholic beverages, rely upon the justifiable expectation that goods advertised and sold for internal human consumption will not cause sudden death unless informed to the contrary by the seller.

51. Defendants' warranty was breached because the whiskey was not reasonably fit for Eural Frank Abernathy's

foreseeable use. The breach of warranty proximately contributed to Eural Frank Abernahty's death.

52. Wherefore, Plaintiff prays for judgment against Defendants for $500,000.00 compensatory damages.

WILLFUL AND WANTON INJURY

53. Paragraphs 1 through 15 are re-alleged.

54. When Defendants chose to sell their produce with full implied warranty of fitness, they had actual knowledge that consumers of various nature and abilities were using it in such a way that they were being subjected to poison-ing and sudden death shortly after con-sumption. Defendants knew the purpose for which the whiskey was purchased. Defendants had reason to know that pur-chasers of goods intended for internal

human consumption rely upon the justifiable expectation that such goods will not cause sudden death unless in-formed to the contrary by the seller. Notwithstanding such knowledge, Defen-dants committed oen or more of the following willful and wanton acts or omissions:

a. Defendants advertised and sold the beverage and failed to modify their full implied warranty by providing adequate information to the consumder that:

(1) When too much alcoholic beverage is consumed at once, acute ethanol poison-ing death follows.

(2) Defendants failed to exclude the full implied warranty.

55. The foregoing wrongful acts or omissoins proximately contributed to Eural Frank Abernathy's death.

56. Wherefore, Plaintiff prays for judgment against Defendants for $500,000.00 compensatory damages and $5,000,000.00 actual damages.

This the 23rd day of September, 1977.

/s/
Ronald Williams
Attorney for Plaintiff
105 Law Building
Charlotte, NC 28202

STATE OF NORTH CAROLINA)
)
COUNTY OF MECKLENBURG) VERIFICATION

RALPH S. ABERNATHY, being first duly sworn, deposes and says that he is the Plaintiff in the foregoing Complaint, that he knows the contents thereof, and that the same is true of his own knowledge, except for those matters stated on information and belief, and as to those matters, he believes them to be true.

/s/
Ralph S. Abernathy

Subscribed to and sworn before me this 31st day of August, 1977.

My commission expires: 05-30-82.

/s/ Marlene Henry
Notary Public

EXHIBIT E

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
77 CvS 7412

RALPH S. ABERNATHY, Administrator for the Estate of Eural Frank Abernathy,

Plaintiff,

vs. JUDGMENT
Filed 02-21-78

SCHENLEY INDUSTRIES, INC., and Subsidiaries, SCHENLEY DISTILLERS, INC., and SCHENLEY AFFILIATED BRANDS CORP.,

Defendants.

THIS cause was heard before the undersigned Judge Presiding at the Schedule A term of Mecklenburg Superior Court on February 20, 1978, upon the motion of the defendants to dismiss under Rule 12(b)(6) and for summary

judgment under Rule 56. Upon the record, including certified copies of proceedings in a prior action in the federal courts, and upon the argument of counsel for the plaintiff and counsell for the defendants, the Court is of the opinion and holds that the plaintiff's alleged cause of action is barred by the Statute of Limitations.

IT IS THEREUPON CONSIDERED AND ADJUDGED that the motion of the defendants be and it is granted and this action is dismissed.

This the 21st day of February, 1978.

/s/ Ken Griffin
JUDGE PRESIDING

EXHIBIT F

In The
UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

76-2424

Ralph S. Abernathy, Administrator of
The Estate of Eural Frank Abernathy,

Appellant,

vs. MOTION

Schenley Industries, Inc., Schenley Distillers, Inc., Schenley Affiliated Brands Corp., Mecklenburg Board of Alcoholic Beverage Control,

Appellees.

This action was filed by a North Carolina resident within the period of limitation naming the affiliated Schenley companies (all non-residents) and Mecklenburg Board of Alcoholic Beverage Control, a North Carolina resident, as defendants alleging federal and state claims deriving from a common nucleus of operative fact. The District Court first

ruled that plaintiff had a cause of action under the Federal Alcohol Administration Act and the Consumer Product Safety Act but reversed and dismissed all federal claims on their merits. In the same order the pendent state claims were dismissed. This court affirmed the dismissal of the federal claims on the merits and the discretionary dismissal of the state claims saying by reference to United Mine Workers v. Gibbs, 383 US 715, 726(1966) that as a matter of comity and fairness to the litigants the state claims were dismissed without prejudice for a surer-footed reading of state law by a state tribunal.

Following the court's suggestion, Appellant on September 23, 1977 filed his state action (Appendix A) but while the action was pending in the Federal

Courts the two year statute of limitations had expired. Defendants pled the two year statute of limitations and moved for Summary Judgment based on the bar of the Statute (Appendix B). On February 21, 1978 the court granted Summary Judgment to defendants (Appendix C). Plaintiff gave Notice of Appeal (Appendix D). While it is the federal rule (1) that an action filed in State Court within the limitation period and dismissed on grounds other than the merits may be filed in a Federal Court thereafter despite the fact the limitation period expired during the pendency of the state action and the majority of the states reciprocate, there is a grave question as to whether the North Carolina courts will do so. In Motor Co. v. Credit Co., 219 NC 199(1941); Brooks v. Lumber Co., 194 NC 141(1927), and in Fleming v. Railroad, 128 NC 59(1901) the North Carolina Supreme Court ruled with the majority. However, in two recent cases the Supreme Court in High v. Broadnax, 271 NC 313(1967) and the Court of Appeals in Cobb v. Clark, 4 NC App 230(1969) overruled the prior holding (Appendix F). It is unlikely the North Carolfina Appellate Courts will reverse the lower court's Summary Judgment. The state appeal appears to be an exercise in futility.

WHEREFORE, pursuant to Rules 2, 26(b) and 27 of the Federal Rules of Appellate Procedure, appellant moves the court for an order directing the United States District Court to try the state claims on the merits because to decline pendent jurisdiction under circumstances where it is unlikely those claims will be heard on their merits is an abuse of discretion. Discretion should be exercised so as to facilitate, rather than to avoid, a decision on the merits.

In the alternative appellant moves to voluntarily dismiss Mecklenburg Board of Alcoholic Beverage Control so as to confer diversity jurisdiction on the Federal Court.

As a third and least desirable alternative appellant moves the court to amend its Order of Dismissal nunc pro tunc explicitly stating that dismissal of the state claims was not on the merits and that the action may be instituted within one year after July 7, 1977, the date of the original order of this court, so as to satisfy Rule 41(b) North Carolina Rules of Civil Procedure (Appendix E), and that if the State Court, after appeal, declines to hear the state claims on their merits the Federal Court will reconsider whether dismissal of the pendent state claims by the United States District Court

was an abuse of discretion.

Appellant urges the court to order a trial on the merits in the United States District Court.

This the 24th day of February, 1978.

/s/ Ronald Williams
Ronald Willliams
Attorney for Appellant
Suite 100 Attys. Bldg.
806 E. Trade St.
Charlotte, NC 28202
(704) 375-4741

CERTIFICATE OF SERVICE

This is to certify that the undersigned has this date served this pleading in the above entitled action upon all other parties to this cause by depositing a copy hereof in a post-paid wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office Department, properly addressed to the attorney or attorneys for said parties.

This the 24 day of Feb 1978

/s/ Ronald Williams

(1) Lamson v. Hutchings (1902; CCA7th) 118 F 321 (writ of certiorari denied in (1903) 189 US 514, 47 Led 924, 23 S Ct 853);

Glencove Granite Co. v. City Trust, S.D. & Surety Co. (1902; CCA 3d) 118 F 386 (writ of certiorari denied in (1903)187 US 649, 47 L ed 348, 23 S Ct 847);

Harrison v. Remington Paper Co. (1905; CCA 8th) 140 F 385, 3 LRA(NS) 954; 5 Ann Cas 314 (writ of certiorari denied in (1905) 199 US 607, 50 L ed 331, 26 S Ct 747);

Hicks v. Fordham (1917; CCA 5th) 246 F 236;

Jones v. Jenkins (1927; CCA 8th) 22 F (2d) 642;

Federal Reserve Bank v. Kalin (1936; CCA 4th) 81 F (2d) 1003;

Sachs v. Ohio Nat. L. Ins. Co. (1942; CCA 7th) 131 F (2d) 134;

Fordham v. Hicks (1915; DC) 224 F 810;

Privett v. West Tennessee Power & L. Co. (1937; DC) 19 F Supp 812 (affirmed in (1939; CCA 6th) 103 F (2d 1021);

Texas v. Campbell (1941; CCA 5th) 120 F (2d) 191. 156 ALR 1099.

To the same effect see Venn v. Tennessean Newspaper, Inc., 201 F Supp 47 (MD Tenn 1962);

Smith v. McNeal, 109 US 426, 431;

Sinclair Refining Co. v. Bennett, 123 F 2d 884 (6 CA 1941).

EXHIBIT G

UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

No. 76-2424

Ralph S. Abernathy, Administrator
for the Estate of Eural Frank Abernathy,

Appellant,

vs.

Schenley Industries, Inc., Schenley
Distillers, Inc., Schenley Affiliated
Brands Corporation, Mecklenburg Board
of Alcoholic Beverage Control,

Appellees.

Appeal from the United States District Court
for the Western District of North Carolfina,
at Charlotte. James B. McMillan, District
Judge.

Upon consideration of the appellant's motion for an order directing the district court to try the state claims and the responses to the motion, by counsel,

IT IS ORDERED that the motion is denied.

Entered at the direction of Judge Winter for a panel consisting of Judge Winter, Judge Butzner and Judge Hall.

FOR THE COURT,

/s/ William K. Slate, II
CLERK

A True Copy, Teste:
William K. Slate, II, Clerk

By /s/ Emily Pueger

G